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GOVERNMENT BY INJUNCTION.

VILLARI has pointed out that when Machiavelli, the great Florentine, wrote his celebrated treatise on the "Art of War" ("L'Arte Della Guerra"), that shrewd and subtle observer expressed an almost entire want of belief in the efficacy of firearms which nevertheless destroyed the old and created the new system of tactics.

Having this in mind, it behooves us to beware lest we too lightly regard either the introduction of new principles or the great extension and novel application of old principles in our art of forensic contest. It seems timely to discuss the system of injunctions enforced by process of contempt against all persons within the jurisdiction, which has within the past few years been brought into use by some of our highest courts, and which has been so often referred to as "*Government by Injunction.*"

The writ of injunction is of course not a new writ, nor is the proceeding in contempt for its enforcement a novelty in our law. These, like other writs and proceedings, having once been invented and made use of by the courts, and being found useful or convenient, have had a more and more extended use and application as time has gone on.

Mr. Beach, in his recent and comprehensive work on injunctions, says, "In its accepted legal sense, an injunction is a legal process or mandate operating *in personam*, by which, upon certain established principles of equity, a party is required to do or refrain from doing a particular thing."

It is probably inevitable that the development of a department of government which has the exclusive right to construe and define its own jurisdiction should illustrate the maxim quoted by Lord Chesterfield, that "there are misers of money but none of power." It is not in the courts a mere wanton assumption of dominion, however. Cases arise, the extension of a writ to new circumstances is pressed for, and we of the Bar urge on the Bench not to deny it, and therefore we share the responsibility for the constantly increasing control of the judiciary. It is not easy to emulate that splendid impartiality which Chief Justice Marshall displayed when his life-long enemy and opponent, the profligate intriguer, the slayer of his friend Hamilton, stood before him to be tried for his life. "That this court does not usurp power is most true," said the great Chief Justice; "that this court does not shrink from its duty is no less true. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without reproach, would drain it to the bottom. But if he have no choice in the case, if there is no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace." The scales were held with even hand against the clamor of the mob and of his own heart, and if the accused went free, Justice went stainless, for, as the angry prosecutors declared, "Marshall stepped in between Burr and Death."

It is not easy for average men to rise up to so high a standard of duty, nor is it easy for judges, admitting, as we ought, that they are selected men, averaging in many ways above their fellows. If any criticisms are here indulged, or restraints are here suggested, it is hoped they will not be construed as reflections upon the character, attainments, or purpose of our judges, State and National, whom we may well rank as the best and purest of our public servants.

Turning back to the growth of the injunctive power, the doctrine seems to have been early declared that, with certain very limited exceptions, an injunction could issue only against a party to the suit in which it was prayed (or to those acting under his authority). This was examined by Lord Eldon in the much-cited case of Iveson v. Harris,[1] where that eminent equity judge declared: "I have no conception that it is competent to this court to hold a man bound

[1] 7 Ves. p. 256.

by an injunction who is not a party in the cause for the purpose of the case. The old practice was that he must be brought into court, so as, according to the ancient laws and usages of the country, to be made a subject of the writ."

In 1819[1] application was made to our great American Chancellor (Kent) to dissolve an injunction as to three persons, not parties to the bill. The case in 7 Vesey, *supra*, was cited, and the Chancellor held it correct and applicable, quoting and adopting Lord Eldon's words, observing: "I find the court has adhered very closely to the principle, that you cannot have an injunction except against a party to the suit." . . . "The court has no right to grant an injunction against a person whom they have not brought or attempted to bring before the court by subpœna."

The doctrine of these cases has been frequently affirmed by courts and text-writers, and the general rule of law as there stated will be found announced by the best and latest writers on the topic of injunction.

But the courts have gone on to hold that, having acquired jurisdiction over property, they might enjoin interference with it by any person, whether a party to the litigation or not.

The doctrine having been well established that injunctions would not issue to prevent the commission of crime, and that courts of equity would not undertake police and executive functions in general, yet an exception was made, and as the courts could enjoin any irreparable injury to property, they held that they could enjoin acts, even criminal, if they were shown to be of such a character as would occasion irreparable injury to property.

Under this latter head great extensions of the scope of injunctions have been made within the past few years in which they have issued to prevent riotous or unlawful conduct in strikes or labor battles. This has led to the most heated discussion of a branch of equity, which has suddenly become a matter of popular interest and controversy, and, as it were, a burning question.

W. H. Dunbar, Esq., of Boston, in a lucid and able article in the "Law Quarterly Review" of London,[2] points out that "to Vice-Chancellor Malins appears to belong the distinction of first exerting the powers of a court of equity to protect employers against their striking employees." "In Springhead Spinning Company *v.* Riley[3] he granted an injunction restraining the defendants, the president

[1] Fellows *v.* Fellows, 4 Johns. Ch. 25. [2] 13 L. Q. R. p. 348, Oct., 1897.
[3] L. R. 6 Equity, 551.

and secretary of a trades union and a printer employed by them, from posting placards and publishing advertisements urging workmen to keep away from plaintiff's factory, where a strike due to a reduction of wages was in progress." But, adds Mr. Dunbar, "The opinion in support of this decision was strongly disapproved by the court of appeal in Prudential Ass. Co. *v.* Knott;[1] and Chief Justice Gray of the Supreme Judicial Court of Massachusetts, now Mr. Justice Gray of the United States Supreme Court, declared that it appeared to be so inconsistent with the authorities and with well-settled principles that it would be superfluous to consider whether upon the facts before him his decision can be supported."[2] "In America," continues Mr. Dunbar, "the resort to equity in labor troubles has been very common."

Thus in 1888 the Supreme Court of Massachusetts[3] held that "banners displayed in front of a person's premises with inscriptions calculated to injure his business and to deter workmen from entering into or continuing in his employment constitute a nuisance which equity will restrain by injunction."

In that case, the defendants, who were officers of the Lasters' Protective Association, with the consent of their association and out of its money caused to be carried in front of Sherry's factory, by a boy hired for that purpose, a banner bearing the following inscription: —

"Lasters are requested to keep away from P. P. Sherry's.

"Per order L. P. A."

The opinion is brief, and depends almost wholly, it may be observed, on English precedents.

In 1893, the Supreme Court of Pennsylvania held, in Murdock *v.* Walker,[4] that an injunction will lie to restrain persons from attempting by force, menace, or threats to prevent workmen from working on such terms as they may agree on with any employer. Said one of the employers in this case to one of those interfering with his workmen, "Our men are getting sick and tired of this;" and the reply was, "That is what we are here for, to make them sick and tired." The injunction was not merely against threats, menaces, and intimidation, but "opprobrious epithets, ridicule, and

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[1] L. R. 10 Ch. 142.

[2] Boston Diatite Co. *v.* Florence Manufacturing Co., 114 Mass. 69, 70.

[3] Sherry *v.* Perkins, 147 Mass. 212.

[4] 152 Pa. St. 595; 25 Atl. Rep. 492.

annoyance" as well. A joke at one of the workmen was a contempt of court. No opinion was filed by any judge, only a direction *per curiam* affirming the action of the lower court.

The same court in 1894[1] held the lower court right in granting a preliminary injunction against the members of a labor union alleged to have combined and conspired to prevent plaintiff, by threats and violence, from employing other workmen in its factory. The opinion is very brief, and cites no authority.

In the same year the case of Barr *v.* Essex Trades Council[2] was decided, wherein an elaborate opinion by Vice-Chancellor Green covering thirty-five pages was filed, and the English and American cases were carefully considered. The conclusion was reached that "a person's business is property entitled under the constitution to protection from unlawful interference. Every person has a right as between his fellow-citizens and himself to carry on his business within legal limits according to his own discretion and choice, with any means which are safe and healthful, and to employ therein such persons as he may select, and every person is subject to the correlative duty arising therefrom, to refrain from any obstruction of the fullest exercise of this right, which can be made compatible with the exercise of similar rights by others."

The facts considered were these: B, the proprietor of a daily newspaper, determined to use plate matter in the make-up of his paper, notwithstanding the interdictive resolution of the local typographical union. The affiliated "unions," comprising a body of operatives in the county of a purchasing capacity of $400,000 a week, issued through the trades council a circular calling on all friends to boycott the paper and to cease buying it and advertising in it. It was also suggested that those who continued to deal with the newspaper would incur the enmity of organized labor.

It was held that there was no adequate legal remedy under these circumstances, and equity would intervene by injunction to prevent irreparable damage or a multiplicity of suits in such a case of continuing injury.

The application of the writ of injunction to the enforcement of penal statutes has been not infrequently provided for in the statutes themselves, especially in liquor and excise laws, and in various federal enactments.

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[1] Wick China Co. *v.* Brown and 26 others, 164 Pa. St. 449; 30 Atl. Rep. 261.

[2] 53 N. J. Eq. 101.

Mr. Arthur C. Rounds, in an article in 9 HARVARD LAW REVIEW, p. 521, mentions that the Interstate Commerce Act,[1] the Anti-Trust Act,[2] and the Tariff Act of 1894,[3] all provide for restraints on their violation by courts of equity. Mr. Dunbar points out in the article referred to above that laws of this type have been held constitutional by the Supreme Court of the United States, and of several States whose decisions are highly considered.[4]

That the legislative power may extend the writ of injunction as an executive means to the enforcement of a statute, penal or otherwise, must therefore be deemed fully established. The common device in these enactments is to declare the offence, as the keeping of a place for the unlawful sale of liquors, a nuisance, and provide for its abatement by the injunctional order of the court at the suit of the public or persons suffering a certain injury therefrom.

The federal judge with his life tenure comes nearer to the ideal judge for whom Marshall declared in the Constitutional Convention of Virginia in 1829 as "rendered perfectly and completely independent, with nothing to control him but God and his conscience," than judges whose honors and emoluments must be restored to them at frequent intervals by popular vote or be forfeited.

The injunctions issued by the federal courts, as might have been foreseen, have been of especial importance in the controversies arising out of strikes and labor difficulties.

The courts rest jurisdiction on various grounds, but mainly under three heads: First, on their right to protect receivers appointed by them in the possession and management of the property intrusted to them. Secondly, on their general right to protect suitors, entitled to come into their forum, from irreparable injury to property and multiplicity of suits. Thirdly, under federal statutes protecting some function confided to national control, as the United States mail or interstate commerce, and often providing especially for injunction as a means of enforcing the law.

Two early cases in contempt seemed to lead the way for the later decisions. These are *In re* Doolittle and another, strikers,[5] and United States *v.* Kane.[6] In the former case, Doolittle and Schan-

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[1] U. S. Stat. 1889, ch. 382, §§ 1, 5. [2] U. S. Stat. 1890, ch. 647, § 4.

[3] U. S. Stat. 1894, ch. 349, § 74.

[4] Kansas *v.* Tiebold, 123 U. S. 623; Eitenbecker *v.* Plymouth Co., 134 U. S. 31; Carelton *v.* Rugg, 149 Mass. 550; State *v.* Sanders, 66 N. H. 39; Littleton *v.* Fritz, 65 Iowa, 488; State *v.* Fraser, 48 N. W. Rep. (N. D.) 343; State *v.* Crawford, 28 Kans. 726.

[5] 23 Fed. Rep. 544 (1885). [6] 23 Fed. Rep. 748 (1885).

backer, the defendants, were engaged in a "strike" against the Missouri Pacific Railroad, and sought to prevent the operation of that road. They in fact interfered with the handling of freight and taking out of an engine by the Wabash road, which was in the hands of a receiver appointed by the federal court. The marshal arrested them for such interference, and an order was made on them to show cause why they should not be punished for contempt of court. Mr. Justice Brewer, who has within a month past advocated the injunctional power in an after-dinner speech at Chicago, in which he compared the critics of government by injunction to the body of Lazarus after it had lain four days in the grave, and District Judge Treat held that in seeking to interfere with the property of the Pacific road the defendants were confederated for an unlawful purpose; and in carrying it out, if they exceeded their intent and interfered unintentionally with the property in the hands of the receiver of another road, they were liable, and they were accordingly sentenced each to the county jail for sixty days, Judge Treat desiring to inflict a still severer penalty.

In United States *v.* Kane, *supra*, where a combination of workmen with forms of request merely, but with a show of force which intimidated, induced the employees of a receiver of a railroad to abandon their duties, and thus prevented the receiver from operating the road, they were held guilty of contempt, and, according to the various measures of their guilt, they were: one discharged on his personal recognizance not to interfere with the management of the road by the receiver; one sentenced to the county jail for ten days, one for thirty days, and one for four months.

In 1891 the Circuit Court for the Southern District of Ohio held, in Casey *v.* Cincinnati Typographical Union,[1] that a combination or a conspiracy by a trades union to boycott a newspaper for refusing to unionize its office is illegal and unlawful, and will be enjoined by a court of equity. "Equity will enjoin the publication and circulation of posters, handbills, circulars, etc., printed and circulated in pursuance of such combination or conspiracy or boycott."

In Coeur d'Alene Consolidated Mining Company *v.* Miners' Union of Wardner,[2] it appeared that, April 29, 1892, about one hundred men, headed by defendant, John Tobin, went to complainant's mine, where affiants were at work, and forcibly ejected them therefrom, took them to the Miners' Union Hall at Burke, where,

[1] 45 Fed. Rep. 135.

[2] 51 Fed. Rep. 260 (1892).

in the presence of a large number of men, it was demanded that they should join the union or leave the camp; that, upon their refusal to do either, it was ordered by the meeting that they be marched out of the State; that thereupon they were escorted in the direction of Thompson's Falls, Montana, by at least two hundred men, who beat oil-cans in imitation of drums; that they were called "scabs," and coarse indignities were heaped upon them; that in this manner they were driven from the State, denied the privilege of purchasing food, and for two days were without any, and exposed to the inclemency of the weather in crossing a snowy range into the State of Montana. On this showing defendants were ordered to refrain from entering on complainant's mines or from interfering with the working thereof, or by force, threats, or intimidation preventing complainant's employees from working upon its mines. District Judge Beaty, after a full hearing, continued the order.

In 1893, Judge Taft and District Judge Ricks decided Toledo, Ann Arbor, and Northern Michigan Railroad Co. *v.* Pennsylvania Railroad Co. *et al.*[1] The complainant company asked an injunction against eight railroad companies which threatened to refuse interstate freight from complainant on the ground that their own engineers were members of the Locomotive Engineers' Brotherhood, and would strike if they hauled freight for a road which employed engineers not of the brotherhood. An injunction was also prayed against P. M. Arthur, president of the brotherhood, to restrain him from requiring the members thereof to refuse to handle such freight. The court held it had jurisdiction to restrain violations of the Interstate Commerce Act which would result in irreparable injury, and had such jurisdiction without any regard to the citizenship of parties. That the facts showed a combination to violate the act, and that all participating were guilty of a criminal conspiracy. That the carrier against which the conspiracy was directed, if injured, had a cause of action against all engaged in it, and since the injury would be irreparable, might have a temporary injunction against it. That an injunction could be extended to the servants of a party enjoined. That persons in the employ of the defendant company, while they continued in such employ, must obey the injunction, but without contempt could avoid obedience by ceasing to be such employees, and that no court had ever com-

[1] 54 Fed. Rep. 730-746.

pelled persons to continue the relation of servants. That Arthur would, by mandatory injunction, be compelled to rescind his unlawful order to the brotherhood if already given, especially if it would otherwise occasion flagrant violations of the order of injunction.

That an engineer (of a company enjoined from refusing to haul the cars of a boycotted line, of which injunction he had notice, though not a party to it) who, while on his run, refuses to attach such a car to his train, and declares that he quits his employment, but nevertheless remains with his engine at that point five hours, until he receives a telegram from his labor union to haul the car, and who thereafter continues in his employment, is guilty of contempt, although those engineers who in good faith quit their employment before starting on their run may not be in contempt, and the offending engineer, although he swore he did not know he was violating and that he did not intend to violate law, was accordingly fined fifty dollars and costs.

In 1894, Judge Jenkins of Wisconsin, of the United States Circuit Court, was applied to by Mr. Henry C. Payne and others, receivers of the Northern Pacific Railroad, on the ground that their employees were contemplating a strike for the purpose of preventing a proposed reduction of wages, and injunctions were asked against them and the heads of various labor organizations. A very comprehensive order was issued to the officers, agents, and employees of the receivers, and to all persons, associations, and combinations, voluntary or otherwise, whether employees of said receivers or not, and to all persons, generally restraining them from interfering with the property of said receivers or their operation of the road, and from "*combining and conspiring to quit, with or without notice, the service of said receivers with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad, and from so quitting the service of the said receivers with or without notice as to cripple the property or to prevent or hinder the operation of said railroad.*"

The number of employees affected by this or kindred injunctions sought appears to have been about twelve thousand, scattered over a distance of four thousand four hundred miles, and application was made by persons enjoined for a modification of various provisions, and especially of that extracted above. The court, however, held that it had jurisdiction through the receivership; that a strike is a combination among workmen to compel the master to the concession of a certain demand by preventing the conduct of his business

until compliance. The concerted cessation of work is but one of the least effective means to the end; the intimidation of others from engaging in the service, interference with and destruction by violence of property and resort to force being other means employed. Such a strike is unlawful, and a federal court having charge by its receivers of an interstate railroad was held to have jurisdiction to enjoin the executive heads of the various organizations of employees from ordering a strike upon the road, and therefore the judgment was modified merely in a few unguarded expressions, and in the main affirmed.[1]

The action of this court seemed to surprise our "kin beyond sea," and the "Law Times" of London[2] described it as showing "the tremendous powers of government and control over the lives and fortunes of American citizens which may be claimed and exercised;" and added, "It was really placing large masses of workmen engaged upon industrial undertakings under a slavery régime." The decision was appealed from and passed upon in the Circuit Court of Appeals in Arthur *v.* Oakes,[3] Mr. Justice Harlan writing the opinion. It was there held "that it would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another. One who is placed in such restraint is in a condition of involuntary servitude — a condition which the supreme law of the land declares shall not exist within the United States, or in any place subject to their jurisdiction. The rule, we think, is without exception that equity will not compel the actual affirmative performance by an employee of merely personal service, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him." That even if the quitting were in breach of contract, the injured party has merely his action for damages; but that equitable relief by injunction against the breach has always been regarded as impracticable. That the peaceful but concerted combination of workmen to withdraw from an employment on account of a reduction of wages, even if amounting to a strike, is not illegal."

The action of the lower court was reversed, and the case remanded with directions for a modification of the injunction accordingly.

In March, 1893, in the United States Circuit Court of Louisiana, in United States *v.* Workingmen's Amalgamated Council of New

[1] Farmers' Loan & Trust Co. *v.* N. Pacific Railroad Co., 60 Fed. Rep. 803.
[2] 97 Law Times, 384, 385. [3] 63 Fed. Rep. 310.

Orleans,[1] an injunction was issued against striking draymen who paralyzed the business of that city, on the theory that this was a conspiracy to interfere with interstate commerce which fell under the Anti-Trust Act. It was suggested by counsel in argument of the Debs case (*post*) that under the rule of this last decision a strike of the elevator boys in a hotel would, in like manner, fall under federal cognizance and be enjoined by the federal court as an interference with interstate commerce.

In the case of Thomas *v.* Cin., N. O. & T. P. Ry. Co., *In re* Phalen,[2] the United States Circuit Court (South. Dist. Ohio, 1894) held that Phalen had been engaged in an unlawful conspiracy with Mr. Debs and others to obstruct the operation of a railroad being managed by the receiver of said court. That such attempt, with the knowledge that the railroad was in the hands of the court, was a contempt. That the attempt being to paralyze interstate commerce and the transmission of the United States mails, was an offence against the Federal statute, though mere cessation of work was solicited, and Phalen was sentenced to six months imprisonment.

Within a few months thereafter (Dec. 14, 1894) the celebrated case of United States *v.* Debs[3] was decided by the United States Circuit Court for the Northern District of Illinois.

Mr. Debs was proceeded against for contempt in violating an injunction issued, on complaint of the United States, on petition of the receivers of the Atchison company. He, with others, officers of the American Railroad Union, was charged with an unlawful conspiracy, in connection with the great Pullman strikes, to interfere with the transportation of the mails and interstate commerce on the railroads named, and a writ of injunction was obtained to enjoin "them and all persons whomsoever" to desist therefrom. The injunction elaborately and in detail forbade various acts which might so operate. It was alleged that, thereafter, defendants sent hundreds of telegrams ordering the members of the union to strike. That violence, interference with, and destruction of the property and structures and operations of the railroads followed, and that defendants knew that violence invariably followed all strikes of similar character.

The opinion, by Circuit Judge Woods, held that the defendants were not entitled to be discharged upon their own sworn answers

[1] 54 Fed. Rep. 994. [2] 62 Fed. Rep. 803.
[3] 64 Fed. Rep. 724.

denying their guilt, even in case of a stranger to the bill for the injunction.

That the so-called Federal Anti-Trust Act of July 2, 1890, declaring illegal every contract combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the States or with foreign nations, is not aimed at capital only, but any such restraint to be accomplished by conspiracy is unlawful. That the power given courts of equity, by said act, to prevent and restrain violations of the act, is not an invasion of the right of trial by jury. That the defendants were guilty of contempt as charged, and they were sentenced to terms of from three to six months. Application was made to the Supreme Court of the United States for a writ of error, but it was denied without an opinion.[1] But a writ of *habeas corpus* was sued out in the Supreme Court, and decided May 25, 1895.[2]

The court held, Mr. Justice Brewer delivering the opinion, that the Federal government, under its powers, could remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mails. That it was competent to intervene to remove or prevent the same by the injunctional power of the civil courts, even although the obstructors might also be liable in the criminal courts. That the injunction might be enforced by proceedings in contempt, and that such proceedings are not in execution of the criminal laws of the land. That the Circuit Court had power to issue its process of injunction and to inquire whether its orders had been disobeyed, and under the statute to punish for contempt in case such disobedience were found. That its findings of the fact of disobedience are not open to review on *habeas corpus* in this or any other court. Justice Brewer speaking, after dinner, at the Marquette Club, Chicago, Feb. 12, 1898, named Judge Woods as the hero of that struggle for the domination of law, whose name will be revered and honored through the coming ages.

In connection with the disturbances in the Pullman strike mentioned above, United States *v.* Agler[3] was decided in 1894 by the United States Circuit Court for the District of Indiana, expressly holding that where an injunction had been issued against Debs and others, it became binding as against one not named in the bill and not served with subpœna, when the injunction order is served on

[1] 15 Sup. Ct. Rep. 1039. [2] *In re* Debs, 158 U. S. 564.
[3] 62 Fed. Rep. 824.

him as one of the unknown defendants referred to in the bill. Says District Judge Baker: "I think an injunction that is issued against one man, enjoining or restraining him, and all that give aid or comfort to him, or all that aid or abet him, is valid against everybody that aids or gives countenance to the man to whom it is addressed. I do not entertain any doubt about that."

And a like doctrine is maintained in the kindred case of United States *v.* Elliott *et al.*,[1] by the Circuit Court of the United States for the Eastern District of Missouri, 1894. District Judge Phillips finds it a case for the strong arm of equity, since "such law-breakers are generally a lot of professional agitators. Their tongues are their principal stock in trade, and inasmuch as imprisonment for debt is abolished, and cruel and unusual punishments are prohibited, an execution would be quite unavailing."

In Elden *v.* Whitesides,[2] the United States Circuit Court, Eastern District of Louisiana, in 1895, at the suit of citizens of Liverpool, England, enjoined defendants from conspiring to prevent the loading or unloading of plaintiff's steamships except by defendants or their confederates, holding the fact that some of the acts enjoined were crimes would not prevent equity from thus intervening to prevent irreparable injury to property rights. On like grounds in Hamilton Brown Shoe Co. *v.* Saxey the Supreme Court of Missouri approve the enjoining unlawful acts which were intended to force men to quit plaintiff's employment.[3]

And the Supreme Court of Illinois, in Barrett *v.* Mt. Greenwood Cem. Ass.,[4] held that the pollution of a stream to the irreparable injury of the persons or property of others would be enjoined notwithstanding it was a crime by statute.

And in Davis *v.* Zimmerman[5] it was held that the lawful business of a man is his property, and a conspiracy to destroy or injure it will be enjoined even though the acts enjoined are criminal.

Like decisions have been made in Consolidated Steel and Iron Company *v.* Murray,[6] Vegelahn *v.* Guntner.[7]

The latter case, decided Oct. 27, 1896, holds that the maintenance of a patrol of two men in front of plaintiff's premises in furtherance of a conspiracy to prevent, whether by threats, intimidation, or by persuasion, any workman from entering into or con-

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[1] 64 Fed. Rep. 27.
[2] 72 Fed. Rep. 724.
[3] Hamilton Brown Shoe Co. *v.* Saxey, 32 S. W. Rep. 1106, 131 Mo. 212.
[4] 42 N. E. Rep. 891, 159 Ills. 385.
[5] 36 N. Y. Supp. 303, 91 Hun, 489.
[6] 80 Fed. Rep. 811.
[7] 44 N. E. Rep. 1077, 167 Mass. 92, 35 L. R. A. 722.

tinuing in his employment, will be enjoined though such workmen are not under contract to work for plaintiff. (To this Field, C. J., and Holmes, J., enter a powerful dissent.)

The court further holds that a continuing injury to property or business may be enjoined though it be also punishable as a crime. Mr. Justice Holmes, dissenting, says (at p. 1081): "If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that when combined they have the same liberty that combined capital has, to support their interests by argument, persuasion, and the bestowal or refusal of the advantages which they otherwise lawfully control." "I can remember," he continues, "when many people thought that, apart from violence or breach of contract, strikes were wicked, as organized refusals to work. I suppose that intelligent economists and legislators have given up that notion to-day. I feel pretty confident that they equally will abandon the idea that an organized refusal by workmen of social intercourse with a man who shall enter their antagonist's employ is unlawful, if it is dissociated from any threat of violence and is made for the sole object of prevailing, if possible, in a contest with their employer about the rate of wages. The fact that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist does not necessarily make it unlawful, any more than when a great house lowers the price of goods for the purpose and with the effect of driving a smaller antagonist from the business."

United States Circuit Judge Caldwell, Nov. 8, 1897, in a dissenting opinion in Hopkins *v.* Oxley Stone Co.,[1] largely quotes from and agrees with Judge Holmes's opinion.

In Nashville, Chattanooga, & St. L. Ry. Co. *v.* McConnell *et al.*,[2] the United States circuit judge for the Middle District of Tennessee, Aug. 19, 1897, enjoined ticket brokers from buying up and reselling round-trip tickets sold by the railroad at special rates on account of the Nashville Exposition, but by their terms not transferable, holding that it was not a fatal objection that the use of the writ was novel nor that the acts enjoined were criminal, but that a continuing interference with the business and contracts of the plaintiff, where the injury was irreparable, and the only remedy at law

[1] 83 Fed. Rep. 912, see p. 931.

[2] 82 Fed. Rep. 65.

was by a multiplicity of suits for damages, was ground for an injunction; and that various brokers dealing with the same class of tickets might all be joined as defendants in one suit.

In the very late case of Mackall *v.* Ratchford,[1] decided Aug. 21, 1897, two days later than the last, in the United States Circuit Court for the Western District of Virginia, an injunction had issued and been served restraining defendants and all others from interfering with the operation of certain mines, and from interfering with the employees thereof in going to and from their work. The defendants joined a body of over two hundred striking miners who marched, with music and banners, past one of said mines and the homes of the miners working therein, marching and countermarching for three days along the public highway between the mines and the home of the miners, halting in front of the mine and taking positions on each side of the road, which the miners must cross in going to and from the mine before daylight and late at night, at the time such miners were going to and from their work. The avowed object of the strikers was to influence the miners to join in the strike; and this marching and halting in front of the mine were with the evident intent to accomplish this object by intimidation, and some of the miners were thereby intimidated and kept away from their work. It was held that defendants were guilty of contempt. The court found the accused knew of the injunction. That the crowd said, "We are used to papers like that," and "I will eat mine for breakfast." The officers warned and besought them not to violate it, but in vain. That outside of their so marching the conduct of the crowd was most commendable, sober, and decent. That they indulged in no threats, or loud, boisterous, or taunting language. The accused had already been in custody three days. They honestly believed they were within their rights so long as they kept within the highway. Therefore their further punishment was limited to three days' confinement in the county jail.

The convenience and efficacy of the rules which seem to be quite generally maintained by these cases for protecting the rights of plaintiffs adequately and promptly can hardly be questioned. But there are others to be considered besides the corporations and employers who either individually, or in the name of the government, are commonly complainants. Rules for the protection of

[1] 82 Fed. Rep. 41.

one class of rights are, to quote the expression of Von Ihering in his "Struggle for Law," "Janus-faced," presenting a beneficent aspect to one class and an entirely different aspect to another class.

We find ourselves confronted, as Mr. Dunbar points out in the article mentioned *supra*,[1] with "the proposition that a court of equity may *ex parte*, upon the motion of the plaintiff, issue an order restraining all persons from doing specific acts, although such persons are not parties to the cause, and in no way connected with the parties, are not identified in any way, and cannot be identified except by the fact of their violating the injunction." And he says this cannot be distinguished from criminal legislation. He points out[2] that the sole reason for preferring this remedy is that in other forms of procedure "those safeguards which have been thought essential to individual liberty" interpose some delay or uncertainty. The protests against the doing away those safeguards have been numerous and worthy of consideration.

Thus F. J. Stimson, Esq., of Boston, has pointed out[3] that in proceedings for contempt punishment is inflicted without indictment, right of counsel, without being confronted with the witnesses, without trial by jury or sentence according to uniform statute, but at the discretion of the judge. We have seen, as held by the Supreme Court,[4] that the findings of the judge as to the facts cannot be reviewed or examined, however erroneous, and this often in matters where his personal feeling is most deeply involved, since it is apt to be the enforcement of his own injunction. There is no appeal or writ of error, and on *habeas corpus* or writ of prohibition or like proceedings commonly nothing but the jurisdiction can be examined, error or abuse of power may go any length unchecked, if it does not exceed jurisdiction. *Ex parte* Lennon[5] illustrates the difficulty and almost impossibility of obtaining a review of these injunctional orders on any ground except the jurisdiction, as does the decision *supra*.[6]

The late Richard C. McMurtie, Esq., attacks the practice[7] above indicated on the ground of "the value of the rule that removes criminal jurisprudence from even the appearance of caprice of the judiciary, and compels the intervention of a public trial with the

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[1] At p. 364.
[2] Page 320.
[3] In vol. 10 Pol. Science Quart. p. 190.
[4] *In re* Debs, *supra*.
[5] 150 U. S. 393, 14 S. C. R. 123.
[6] *In re* Debs.
[7] 31 Am. L. Reg. (N. S.), at page 2.

witnesses brought face to face, a jury to determine the facts, the public discussion of the admissibility and effect of evidence and a fixed standard of punishment, with a right to a review and to an appeal to the pardoning power." He points out that no trace of the proofs taken may be left on which a defendant is incarcerated, as it may be all unwritten testimony, taken "*ex parte* without the accused seeing the witnesses or having an opportunity to ask them a single question," or the proofs may be "by affidavits."

William Draper Lewis, Esq., the learned editor of Blackstone's Commentaries, and now Dean of the Law School of Pennsylvania University, also printed an article[1] entitled "A Protest against administering Criminal Law by Injunction."

The "American Law Register" in editorial notes has criticised the doctrines, and among other things observed: "The Star Chamber, which has been aptly described as a court of 'Criminal Equity,' spent its time in issuing orders to persons forbidding them to commit crime. The popular feeling against the court was based not so much on the fact that many new-fangled crimes were invented, as on the objection 'to the summary manner in which those charged with contempt of the court's orders were convicted.'"[2]

Charles Clafflin Allen, Esq., of St. Louis, presented a paper before the American Bar Association under title "Injunction and Organized Labor," in August, 1894,[3] in which the authorities up to that date were most laboriously collected and reviewed and the dangers of the practice earnestly discussed.

Nor have the courts uniformly acquiesced in the doctrines indicated in the decisions reviewed above.[4]

So it is held a trade union against whose members plaintiff discriminates in employing labor will not be enjoined from sending circulars to plaintiff's customers to induce them to withdraw their custom from plaintiff as long as such discrimination continues, when defendants are not guilty of any violence or injury to property or intimidation.[5] And the Court of Appeals of New York, in Reynolds *v.* Everitt,[6] held, Dec. 18, 1894, that "an employer is not entitled

[1] 33 Law Reg. and Rev. 882.

[2] 31 Am. L. R. p. 785.

[3] Reports of Am. Bar Assoc. vol. 17, p. 299.

[4] See Worthington *v.* Warring, 36 Cent. L. J. p. 170, March 3, 1893; Mogul St. Ship Co. *v.* McGregor, 15 Q. B. Div. 476; Johnston Harvester Co. *v.* Meinhart, 9 Abb. N. C. 393.

[5] Sinsheimer *v.* United Garment Workers of America, 28 N. Y. S. 321, reversing same case, 26 N. Y. Supp. 152.

[6] 39 N. E. Rep. 72, 144 N. Y. 189.

to an injunction against striking employees for inducing others by entreaty or persuasion to leave his employment, where no intimidation is used." Circuit Judge Putnam, in United States *v.* Patterson,[1] held that the anti-trust law was not intended to and did not authorize the federal courts to intervene in cases of strikes and boycotts affecting interstate commerce.

In 1893 the case of Bohn Manufacturing Co. *v.* Hollis[2] was decided, which held (I give the syllabus): "Any man (unless under contract obligation or unless his employment charges him with some public duty) has a right to refuse to work for or deal with any man or class of men, as he sees fit, and this right which one man may exercise singly any number may exercise jointly.

"2. A large number of retail lumber dealers formed a voluntary association by which they mutually agreed that they would not deal with any manufacturer or wholesale dealer who should sell lumber directly to consumers, not dealers, at any point where a member of the association was carrying on a retail yard, and provided in their by-laws that, whenever any wholesale dealer or manufacturer made any such sale, their secretary should notify all the members of the fact. The plaintiff having made such a sale, the secretary threatened to send notice of the fact, as provided in the by-laws, to all the members of the association. Held, not actionable and no ground for an injunction."

And in 1895, in the Circuit Court of the United States, N. D. California, the case of Continental Insurance Company *v.* Fire Underwriters[3] held, "An association of fire underwriters formed under an agreement providing for the regulation of premium rates, the prevention of rebates, the compensation of agents, and non-intercourse with companies not members, is not an illegal conspiracy, and the accomplishment of its purpose by lawful means will not be enjoined at the instance of a company not a member of the association." Each of these cases extensively reviews the earlier English and American cases, and each relies largely on the famous English precedent already referred to, Mogul Steamship Co. *v.* McGregor,[4] in which a decision by Lord Chief Justice Coleridge was affirmed by the Court of Appeals (Q. B. Div.) and by the House of Lords, which upheld the right of an associate body of shipowners, trading between China and London,

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[1] 55 Fed. Rep. 605.
[2] 55 N. W. Rep 1119, 54 Minn. 223.
[3] 67 Fed. Rep. 310.
[4] 15 Q. B. 476, 21 Q. B. 544, 23 Q. B. 598 (1892), L. R. App. Cas. 25.

who sought to keep up the rate of freights and to monopolize the carrying trade. They issued a circular offering a rebate to shippers who dealt with them exclusively and who would not deal with the plaintiffs. They also combined and offered to carry freight at losing figures in order to frighten plaintiff from the field. This was held not to be an unlawful conspiracy, even though the intent might be to ruin competitors. "They have a right to push their lawful trade by all lawful means," said the Lord Chief Justice, "and to give benefits to those who deal with them exclusively." And Lord Justice Bowen observed, "If peaceable, honest combinations of capital for purposes of trade competition are to be struck at, it must be by legislation, for I do not see that they are under the ban of the common law." The opinion in the last above federal decision cites numerous American cases supporting this English decision.

It is the contention of those near to the labor organizations that these cases establish the legality of combinations of capitalists, even of moderate or small capitalists and business men, as retail lumber dealers and insurance agents, for the purpose, by non-intercourse and by at least partial boycott, of disciplining those who do not join their combination or do not transact business as they wish it to be done, but that the courts hold an exactly opposite rule when they pass upon the peaceful combinations of humbler laboring men to maintain wage rates, and to declare for non-intercourse with those who will not join them or who oppose them. It is difficult to see why the rules should not be identical, and, if the courts have appeared to discriminate against those who most need to be taught the impartiality of our administration of justice, it is hoped that later decisions may so plainly establish that "he who runs may read," that there is one rule for all alike.

It is fair to say that these decisions were considered, and sought to be discriminated or limited, in a late federal decision; but not so successfully as to satisfy Mr. Circuit Judge Caldwell, as appears in his dissenting opinion.

The case alluded to is the last important decision which has been observed on this subject, Hopkins *v.* Oxley Stave Co.,[1] in which Judges Sanborn and Thayer upheld an injunction against certain members of a coopers' union which sought to boycott the barrels of the complainant and all provisions packed in them, the

[1] 83 Fed. Rep. 912 (Nov. 8, 1897).

ground of the boycott being that they were hooped by machinery, operated by child labor, which displaced more than one hundred coopers, many of them old and unable to obtain other employment. Circuit Judge Caldwell filed a dissenting opinion, in which he pointed out that the only ground for equity assuming jurisdiction was that the defendants were "persons of small means," and held that as the combination was not accompanied by violence or threats, it was not unlawful and ought not to be enjoined. He says: "Courts of equity have no jurisdiction to enforce the criminal laws. It is very certain that a federal court of chancery cannot exercise the police powers of the State of Kansas, and take upon itself either to enjoin or to punish the violation of the criminal laws of that State. It is said by those who defend the assumption of this jurisdiction by the federal courts, that it is a swifter and speedier mode of dealing with those who violate or threaten to violate the laws than by the prescribed and customary method of proceeding in courts of law; that it is a 'short cut' to the accomplishment of the desired object; that it avoids the delay and uncertainty incident to a jury trial; occasions less expense and insures a speedier punishment. All this may be conceded to be true. But the logical difficulty with this reasoning is that it confers jurisdiction on the mob equally with the Chancellor. Those who justify or excuse mob law do it upon the ground that the administration of criminal justice is slow and expensive, and the results sometimes unsatisfactory. It can make little difference to the victims of short-cut and unconstitutional methods whether it is the mob or the Chancellor that deprives them of their constitutional rights." He continues: "In that masterly statement of the grievances of our forefathers against the government of King George, and which they esteemed sufficient to justify armed revolution, are these: 'He has combined with others to subject us to a jurisdiction foreign to our Constitution and unacknowledged by our laws,' and 'for depriving us in many cases of the benefit of trial by jury.'" He points out that the provisions of our Constitution were adopted by a people smarting under these wrongs, to prevent their repetition, and that the provisions are "not obsolete, and are not to be nullified by mustering against them a little horde of equity maxims and obsolete precedents originated in a monarchial government having no written constitution." He says: "It is competent for the people of this country to abolish trial by jury and confer the entire police powers of the State and nation on

federal judges, to be administered through the agency of injunctions and punishment for contempt; but the power to do this resides with the whole people, and it is to be exercised in the mode provided by the Constitution. It cannot be done by the insidious encroachments of any department of government."

That there has been a serious modification of the received conception of the scope of injunction within the past few years is suggested by the fact that Mr. High, in his well-known work on Injunctions,[1] cites the Atty.-Genl. *v.* R. R. Co.[2] (the Potter Law Case), where the railways were enjoined from violating a statute as to their rates for transportation as "the only precedent for the interference of equity to enforce by injunction obedience to a penal statute," and adds, "It certainly extends the jurisdiction by injunction to a point unsustained by principle and upon authority."

That case rests upon the special ground of the right of equity at the suit of the Attorney-General to restrain a corporation in matters *publici juris* from excess or abuse of corporate franchise or violation of public law to the public detriment.

The power of the court to punish for contempt cannot be taken away, or courts would become "mere debating societies," as has been well said, but it may be defined and regulated by statute. "It is and must be a power arbitrary in its nature and summary in its execution. It is perhaps nearest akin to despotic power of any power existing under our form of government."[3]

That case well illustrates the importance of supervision in proceedings for contempt. Hon. W. F. Bailey, Circuit Judge for Eau Claire County, was a candidate for re-election. He was criticised by a member of the bar in a newspaper of the county. His court was in session. He caused proceedings in contempt to be brought against the member of the bar and the editor of the paper. They in their affidavits alleged the truth of their charges, and while the matter was pending an alternative writ of prohibition was obtained from the Supreme Court of the State and served on Judge Bailey. He announced that he would proceed no further in the pending proceedings, but at once made an order adjudging both defendants guilty of a new contempt in the immediate presence of the court, and sentenced each to jail for thirty days. The Supreme Court, resting on the statutory definitions of contempt, holds that the acts

[1] Third edition, 1890, note, p. 21. [2] 35 Wis. 424.

[3] State *ex rel.* Atty.-Gen. *v.* Cir. Ct. Eau Claire Co. (Wisconsin, 1897), 72 N. W. Rep. 194.

complained of were not a contempt in Wisconsin, although they might be at common law, and that therefore the lower court had no jurisdiction; and that a defendant can properly allege the facts which establish a valid defence, and cannot be held to be guilty of a contempt on account of such necessary allegations.

It is difficult to see how the court could have reached this salutary result without the aid of statute, however.

The statutes of Wisconsin,[1] and it is believed of most of our States, define contempts, provide for the trial of those charged therewith, and greatly limit the punishment (in Wisconsin not to exceed thirty days in county jail and $250 fine).

In the absence of statute, the power of the judge appears to be unlimited. An anonymous writer in the "Law Times" (London),[2] points out the unrestrained power of the Chancellor in these respects. He quotes Sir Erskine May as to Lord St. Leonard's communication concerning the hardships upon prisoners for contempt, and mentions the case of one who died in prison after a confinement of more than fifty years. He quotes Hallam's "Constitutional History" to the effect that in the punishment for contempt by the House of Lords, as far as precedent is concerned, "there seems nothing (decency and discretion excepted) to prevent their repeating the sentences of James I.'s reign, — whipping, branding, hard labor for life. Nay, they might order the Usher of the Black Rod to take a man from their bar and hang him up in the lobby;" and the writer continues, "The House of Lords and the Court of Chancery possess, in their powers of committing for contempt, a power which may be as truly described as tyrannous — which is the word Hallam uses — as the power of arrest on suspicion till recently exercised by the *procureur de la République* and *Juge d'Instruction* in France."

Revised Statutes U. S. at section 725 gave the Federal, District, and Circuit Courts, which of course have none but statutory powers, the right to punish contempts by fine or imprisonment at the discretion of the court. But this anomaly of absolute and unrevised power in respect to fine and imprisonment in a court, or single judge at chambers, as in bankruptcy (and that there may still be contempts in bankruptcy, see Owen *v.* Potter[3]), has not escaped the attention of our federal Congress. A bill passed the Senate June 10, 1896,[4]

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[1] R. S. Wis. §§ 2565–2570.

[2] Jan. 22, 1898 (vol. 104, pp. 278, 279).

[3] Mich., Jan. 25, 1898, 73 N. W. Rep. 977.

[4] See 30 Chicago L. News, p. 46.

reported by Senator Hill from the Judiciary Committee, to divide all contempts of court into direct and indirect, to allow summary judgment in the former, but requiring a record of the judgment and proceedings and providing for the filing of a written statement of accusation in all indirect contempts, and that the accused be required by an order fixing the time to answer. That trial shall proceed on testimony *produced as in criminal cases, that the accused shall be confronted by the witnesses, and on demand must be tried by a jury.* That a bill of exceptions may be had and the proceedings be reviewed on direct appeal or writ of error.

This bill went to the House of Representatives and was referred to the Judiciary Committee, and with great modifications, by which specific questions only might be submitted to the jury, but the court must on the answers of the jury determine the question guilty *vel non*, was reported by the majority of that committee.[1]

This substitute was submitted to and approved by the representatives of five of the principal labor organizations of the country. A minority of four of the House Judiciary Committee favored the passage of the Senate bill, and denounced the substitute as an attempt to give only a pretence of a jury trial in such cases.

The Hon. David B. Henderson, chairman of such committee, under date of Jan. 17, 1898, writes me that the bill was not reached for consideration in the last Congress, and that a bill similar to the House substitute was offered in the present Congress Dec. 15, 1897, by Mr. Sulzer, which, I understand, is undisposed of. It is hoped that some adequate and reasonable measure may be enacted by which at least a review, upon the merits, of proceedings so deeply affecting the liberty of citizens may be had, and that at least as efficient safeguards may surround the person as are provided for property rights. It is not especially pleasant to reflect that each of us enjoys his right of liberty on sufferance, subject to the caprice of any judge or court commissioner of the jurisdiction, and that in case of capricious wrong it would be a happy accident if he could get the matter before the superior courts in such a manner as to permit them to correct injustice; yet that seems hardly a misstatement of the present condition of the law, except as statutes have modified it.

It is well that the administration of justice should not only be conducted, but should be obviously controlled, by definite law. The

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[1] Report No. 2471, 54 Cong. Sub. 11.

principle of the Massachusetts Bill of Rights, which at every reading so deeply moved Mr. Rufus Choate, that this is a government of laws and not of men, ought not to appear to be forgotten. It must be remembered that the habitual participation of laymen in the administration of justice as triers of the fact greatly reconciles the body of the people to the decision of controversy by legal proceedings. The Three Tailors of Tooley Street thus participate and approve, and their approval is valuable.

The late Lord Chief Justice Coleridge said that he always had a doubt as to whether the world would have been harmed if all the cases in, I think it was, Barnewall and Adolphus' Reports had been decided the other way; but it is suggested that if the English people had felt that those cases were wrongly decided, there would have been serious harm. The satisfaction of the people with the machinery for administering justice is of prime importance. The disposition of the judges, which is a part of their human nature, to construe power into their own hands, is met by a kindred and equal desire in the laymen to keep their share in affairs. The strain put upon the courts, especially in meeting the difficulties which have been met, and I will not say ill met, by injunctions in the cases considered, is very great. The State has been called "a corporation armed for the preservation of peace," and it has been able by this device to show an efficiency for that purpose which has surprised all and delighted many. The present Chief Justice of the United States, before he became the head of the bench, remarked of a reforming member of the Chicago bar, "Brother B. would codify all laws in an act of two sections: 1st, All people must be good; 2d, Courts of equity are hereby given full power and authority to enforce the provisions of this act." It may be mentioned that this witticism was quoted in the brief of counsel for Mr. Debs, but without naming its author, in the argument of the *habeas corpus* before the United States Supreme Court.

It is submitted that the pleasantry of the Chief Justice hardly goes beyond the powers which the courts of equity have within the past eight years evolved and, on the whole, not unwisely exercised, yet it would strengthen their hold on all just powers and add a needed safeguard for the citizen, if the rights of one accused of contempt were protected by statutory enactment as to the method of trial and the sentence which might be inflicted, and if a proper review of unjust and unwise action by the court or judge imposing punishment for contempt were provided.

It would seem as if the government of this vast new territory, which equity has successfully taken possession of, should be provided for by adequate legislation, and, without saying that gross wrongs have been done, that "the door should be locked before the horse is stolen."

Already many courts deny the right of the legislature to even regulate their proceedings in contempt cases,[1] although others, including the Supreme Court of Wisconsin, freely admit this power.

Under the name of constructive contempts the way seems open, except as statutes and the good sense and good character of our judges prevent, for as serious an invasion of right as obtained in England under the name of constructive treason, so carefully guarded against in our Constitution.

In the meantime, however, it is right to note that a careful examination of the American Digests for the past eight years shows no undue growth of the use of injunctions and proceedings for contempt, since the titles under the head of injunction number in 1890 228, and in 1897 277; covering in 1890 14½ pages, and in 1897 17½ pages; and under the head "contempt" numbered 74 titles in 1890 and 80 titles in 1897, covering four pages in the former and four and a half in the latter year.

Gunpowder had not altered the art of war when Machiavelli wrote, although it had then been known in Europe for about two hundred years, nor has government by injunction yet seriously modified the practice of law. That there were great potentialities in gunpowder must be admitted, and its far-reaching effects on war and on civilization have been proved. I am not sure but that great potentialities yet rest in the use of the injunction in the manner established within the past few years. I only hope that both Bench and Bar, and legislative bodies as well, may use and develop them wisely, justly, and for the good of all, and especially may content a great people with the sense of that noble possession which Jefferson promised in his inaugural address, "Equal and exact justice to all men of whatever state of persuasion."

Charles Noble Gregory.
COLLEGE OF LAW, UNIVERSITY OF WISCONSIN.

[1] See Hale *v.* State (Ohio, 1896), 45 N. E. Rep. 199; Rapalje on Contempt, § 11.